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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARTAYE IRVING,

Defendant and Appellant.

D055805

(Super. Ct. No. SCN253556)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Kearney, Judge. Reversed in part; affirmed in part and remanded with directions.

Cartaye Irving entered a negotiated guilty plea to assault by means likely to produce great bodily injury (GBI) (Pen. Code,¹ § 245, subd. (a)(1)), and admitted personally inflicting GBI (§ 1192.7, subd. (c)(8)). The court sentenced him to the three-year middle prison term and awarded 245 days' actual plus 122 section 4019 credits, a

¹ All statutory references are to the Penal Code.

total of 367. Irving appeals. We remand with directions to determine the correct number of credits.

BACKGROUND

Kristin Forster had a restraining order against Irving, her former boyfriend. On November 5, 2008, Irving broke into her apartment and hid behind the bedroom closet door. Forster came home with two friends, Ronald P. and Jamison Franklin. Forster and Ronald got in bed while Franklin took a shower. Irving emerged from his hiding place and swung a metal curtain rod, striking Ronald in the face numerous times. Irving also hit Forster with the curtain rod. Forster ran out of the apartment and called the police. Irving blocked the bedroom door to prevent Franklin from entering to help Ronald. Franklin eventually forced the door open and he and Ronald ran out of the apartment. Irving fled and hid nearby.

Ronald was taken to the hospital with serious facial injuries including a broken palate, injury to his mouth and several broken teeth. He required six internal sutures and eight external sutures. Forster had several wounds to her arm and leg but did not require sutures.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel lists, as possible but not arguable issues, (1) the validity of the guilty plea and waivers of constitutional rights; (2)

the correctness of the credits calculation, and Irving's entitlement to additional presentence custody credits pursuant to the recent amendment of section 4019; and (3) the sufficiency of the evidence to support the award of victim restitution (§ 1202.4), a medical bill presented by the prosecutor.

We requested letter briefs from both counsel discussing the correctness of the credits calculation. The response of appellant's counsel noted Irving's plea was to a serious felony and cited section 4019. The response of respondent's counsel asserted the trial court should not have awarded Irving any credits because while he was in custody in this case, he was also in custody in a probation revocation case and received credits in that case. After the time had passed for filing the letter briefs, appellant's counsel filed a reply and request for judicial notice. We granted respondent's request to strike the reply and request for judicial notice.

Irving was in custody in this case from November 5, 2008, through sentencing on July 7, 2009, a total of 245 days. Irving was in custody in a probation revocation case (case No. CN250977) during the same period, plus five more days. In case No. CN250977, the court imposed a concurrent sentence and awarded Irving 250 actual and 124 section 4019 credits, a total of 367. We remand this case to the trial court with directions to determine the correct number of credits. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191, 1193-1194.)

We granted Irving permission to file a brief on his own behalf. He has not responded. A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues listed pursuant to *Anders v. California, supra*, 386 U.S. 738,

has disclosed no reasonably arguable appellate issues. Irving has been competently represented by counsel on this appeal.

DISPOSITION

The award of credits is reversed. The case is remanded to the trial court for a determination of the correct number of credits, and, if necessary, amendment of the abstract of judgment and forwarding of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.